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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~963~~ 51

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, ET AL.,

Appellants,

vs.

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED.

APPEAL FROM THE SURROGATE'S COURT OF KING'S COUNTY OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

ANDREW F. VAN THUN, JR.,
Counsel for Appellees.

WILLIAM J. CARR,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 968

IN THE MATTER OF THE APPLICATION OF IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, FOR A DETERMINATION OF THE RIGHT OF HELENA DAY McGLONE TO ELECT UNDER SECTION 18 OF THE DECEDENT ESTATE LAW TO TAKE AGAINST THE PROVISIONS OF SAID LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED.

IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT AND CODICIL THERETO OF JOHN J. McGLONE, DECEASED, THOMAS F. McGLONE, ROSE McGLONE MEREDITH, EDWARD McGLONE AND ROBERT McGLONE, INFANTS, by RALPH L. KASKELL, JR., SPECIAL GUARDIAN,

Appellants,

against

CHASE L. DAY, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HELENA DAY McGLONE, DECEASED,

Respondent.

STATEMENT OF APPELLEE, OPPOSING THE JURISDICTION OF THE COURT, AND MOTION TO DISMISS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the appellee, Chase L. Day, as executor of the Last Will and Testament of Helena Day McGlone,

deceased, and in accordance with Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, hereby objects to the jurisdiction of this Court as asserted by the appellants and moves for a dismissal of the appeal herein upon the following grounds.

Statement of Facts.

Helena Day McGlone, then Helena Day Snyder, married the decedent, John J. McGlone, in London, England, on February 4, 1922.

On August 21, 1930, the decedent, John J. McGlone, made and executed his Last Will and Testament, in and by which he provided in paragraph "Third" thereof as follows: "Third: My dear wife, Helena Day McGlone, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character".

On July 6, 1934, the decedent made and executed a Codicil to his said Will of August 21, 1930, in and by which he changed the provisions of the Will in reference to his brother, Ignatius V. McGlone, revoked the appointment of his brother, Ignatius V. McGlone, as executor and appointed another executor, and left intact the provisions made in his Will for the benefit of his wife.

The decedent died on February 22, 1937, in the County of Kings, State of New York. His said Will and Codicil thereto were duly proved and admitted to probate by the

Surrogate of the County of Kings, State of New York, on April 8, 1937. That on September 23, 1937, Helena Day McGlone, widow of the decedent, served, filed and caused to be recorded in the office of said Surrogate of the County of Kings, a notice of election to take her share of the estate of the decedent, as in intestacy, pursuant to the provisions of subdivisions 1 and 7 of Section 18 of the Decedent Estate Law of the State of New York (Chap. 13 of the Consolidated Laws of 1909, Section 18, as amended by Laws of 1929, Chap. 229, Section 4, in effect September 1, 1930, and by Laws of 1936, Chap. 114, in effect September 1, 1936.

That after the filing and recording of said notice of election, the executors of the Will of the decedent filed a petition in said Surrogate's Court, pursuant to Section 145 of the Surrogate's Court Act of the State of New York, praying for a determination of the right of said Helena Day McGlone to elect, under said Section 18, to take against the provisions of the Will of the decedent. It is alleged in the petition that said Helena Day McGlone, then Helena Day Snyder, on February 2, 1922, two days before her marriage to the decedent, "in contemplation and in consideration of said marriage between John J. McGlone and Helena Day Snyder, and for other good and valuable consideration" executed and delivered to said John J. McGlone the following instrument:

> "The Beverleys, Osterley, Middlesex, England. February 2, 1922. Savoy Hotel, London, W C 2.
>
> I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess in my own right, ample of this world's goods in the way of a fortune of my own as a compliment to my aforesaid husband, and for

other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized. Helena Day Snyder".

Said petition also alleged, "That at the time of the execution and delivery of said instrument said Helena Day Snyder had full knowledge of the nature, terms and effect thereof". That petitioners claim that by the said instrument the said Helena Day McGlone did "voluntarily and irrevocably agree to and did renounce, release and waive all right in the estate of said John J. McGlone, deceased; and that such agreement, renunciation, release and waiver is in full force and effect", and that she "has no interest or share in the estate of said John J. McGlone, deceased, except as provided in paragraph "Third" of his will".

That said Helena Day McGlone, by answer to the petition and stipulation admitted the making and delivery of the said instrument, and denied the allegations that said instrument was executed "in contemplation and in consideration of said marriage", and "for other good and valuable consideration", and that she had "full knowledge of the nature, terms and effect thereof".

Upon the hearing of the issues raised by the petition and answer, the petitioners offered in evidence the stipulation amending the answer, the said instrument, and the certificate of marriage. No oral evidence was introduced by the petitioners, and no proof was made of the allegations of the petition denied by the answer. No oral evidence was offered by the said Helena Day McGlone. The Surrogate found that the estate of the decedent was valued, in the Estate Tax proceeding, at $235,852.74, as stated in the opinion of the Surrogate.

The Surrogate made a decree to the effect that said Helena Day McGlone was "entitled to exercise her personal

right of election to take against the terms of the Will and Codicil of said decedent", and that the notice of election pursuant to Section 18 of the Decedent Estate Law duly served by her and filed and recorded, was a valid and effective exercise of such right of election. The Surrogate rendered an opinion which is reported in 171 Misc. Reports, page 612.

Upon appeal by the petitioners to the Appellate Division of the Supreme Court of the State of New York, Second Department, the decree of the Surrogate was reversed. The opinion of the Appellate Division is reported in 258 App. Div. Reports, page 596.

Upon appeal to the Court of Appeals of the State of New York the order of the Appellate Division was unanimously reversed and the decree of the Surrogate's Court affirmed. The opinion of the Court of Appeals is reported in 284 N. Y. 527.

I.

The Appeal is Not Authorized under Section 237 of the Judicial Code (28 United States Code, Section 344).

Appellants' rely, primarily, upon Section 237a of the Judicial Code (Act of February 13, 1925, Ch. 229, 43 Statutes, 936, 937; U. S. Code, title 28, Section 344) to sustain the jurisdiction of this Honorable Court. In order that this Court might entertain jurisdiction, the "validity of the Statute of the State" must have been drawn in question and its validity sustained. We submit that the Statute (Decedent Estate Law, Section 18) did not invade or take away any rights that the testator may have acquired by the instrument executed by Helena Day Snyder on February 2, 1922, two days before her marriage, which were protected by the Constitution of the United States.

The Court of Appeals in consideration of the appeal to that court *assumed without deciding or even considering*

that the alleged instrument of waiver "evidenced, 'a contract made between persons in contemplation of marriage' within the meaning of Section 53 of the Domestic Relation Law * * *; that it is executed in manner which satisfies the requirements of Section 31 of the Personal Property Law * * *; and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law". And the court then stated, "That brings us to the question: What are those contractual or property rights which it is said are destroyed by the new Statute?"

At the time of the making of the alleged instrument by Helena Day Snyder, and at the time of the making of the original Will by the decedent, the decedent had the right, given him by Statutory Law of the State, to dispose of all his property to strangers, except that he could not deprive his wife of her right of dower in any real property of which he was seized during the marriage; and thus the wife would have no right to share in his estate, except by way of dower (Decedent Estate Law, Sections 10 and 15).

On July 6, 1934, the decedent made and executed a Codicil to his Will which under the law of the State is deemed a new Will as of the date of the Codicil (Decedent Estate Law, Section 2; *Matter of Greenberg*, 261 N. Y. 474, 477, 479; opinion of Chief Judge Lehman herein).

Prior to and at the time of the making by the decedent of said Codicil to his Will the Legislature of the State of New York had enacted Section 18 of the Decedent Estate Law, and had abolished inchoate rights of dower, and the right of dower of a widow, except in such lands whereof her husband was seized prior to September 1, 1930 (Real Property Law, Section 190, as amended by Laws of 1929, Ch. 229, Section 12). Thus, by the enactment of Section 18 of the Decedent Estate Law, the Legislature had placed limi-

tations and conditions upon the rights previously existing of a husband or wife to dispose of his or her property, by Will, as to the other or surviving spouse.

The right to make a Will disposing of one's property is, under the Law of New York, and cases decided by this Court, a statutory right only.

Matter of Sherman, 153 N. Y. 1, 3;
Matter of Delano, 176 N. Y. 486, 491, 492;
Brearley School v. *Ward*, 201 N. Y. 358, 368, 373;
Matter of Watson, 226 N. Y. 384, 395; reviewed and aff'd in 254 U. S. 122;
United States v. *Perkins*, 163 U. S. 625, 627;
Mager v. *Grima*, 8 How. (United States) 490, 493;
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288.

In the *Perkins* case, *supra*, this Court stated at page 627:

> "While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control".

That the State, in enacting legislation governing rights as to the disposition of property of a citizen by Will, does not enter into any *contract* with the citizen to the effect that existing law shall not be changed. The contention of appellants would seem to be that the decedent by the instrument in question acquired rights under the existing law which could not be destroyed by legislation without violating the Federal Constitution. But the appellants have overlooked the necessity that a right protected by the Constitution must be a *vested* right. "It must be something more

than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property" (*People ex rel. Eitel* v. *Lindheimer*, 271 Ill. 367). This case was appealed to this Court and the motion to dismiss the appeal was granted for want of a substantial Federal question, in 308 U. S. 505.

The Court of Appeals has stated in its opinion in this case, in respect to the instrument signed by Helena Day Snyder, which the court, for the purpose of argument, assumed to be a contract, that:

> "Whatever be the extent of those contractual rights they did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract. The wife did not, of course, waive her right to take any part of the estate of her 'husband to be' which he chose to bequeath to her, nor may the instrument be given effect as a waiver of a right of a wife to succeed to the property of her husband, which the Legislature might thereafter create. Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights (*Matter of Sherman*, 153 N. Y. 1; *Norris* v. *Beyea*, 13 N. Y. 273). A wife cannot by agreement make the husband's right created by law immune from the right of the State to change the law which created the right nor waive in advance a right created for her benefit if the law does not permit such a waiver.
>
> "The widow makes here no claim for dower. She asserts no right which, at the time she executed the waiver of her rights in her husband's property, she might have asserted but for the waiver. The Legislature has determined to restrict the husband's rights, previously unrestricted, to provide by will how his

property should pass at his death. Even then the Legislature did not decree that a will previously executed should not take effect at the testator's death in accordance with its terms. It decreed only that if a testator chose to execute a new will section 18 of the Decedent Estate Law would apply and that the testator's spouse would then have rights in the decedent's estate which the spouse would otherwise not possess. The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect. The Legislature, with undoubted power to create for the benefit of the spouse of a testator a new right of succession to property and a new limitation upon the power of a testator to determine the succession or distribution by will, had also undoubted power to protect the newly-created right by a statutory provision that a spouse might not waive the benefit of the right created for his or her benefit except by an instrument executed with the formalities set forth in the statute. Quite probably the testator would not have executed a codicil to the will if he had known that his widow might, on that account, claim an interest in his estate which she would not otherwise have. That does not however, give rise to an estoppel or other equitable ground for denying to the wife her statutory right".

What we have said above is based on the assumption that the instrument in question constituted a valid contract. In all the courts below, we argued that the instrument was not a contract within the meaning of the Federal constitutional provision; that it lacked consideration; that it was unilateral in character and did not bind John J. McGlone in any manner as to the disposition of his property; that the ceremony of marriage was not a consideration for it, as the agreement or engagement to marry had already been made at the time the instrument was signed and delivered. That the instrument amounts to nothing more than a gratuitous

promise. The Surrogate, in his elaborate opinion, reviewed the question whether the instrument was in reality a contract and found it was not, and also reviewed the question whether it was a contract within the contemplation of the Federal Constitution.

It was well stated by Judge Cardozo in *DeCicco* v. *Schweizer*, 221 N. Y. 431, at page 438: "One other line of argument must be considered. The suggestion is made that the defendant's promise was not made *animo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its *motive* in the engagement of the daughter to the Count. Undoubtedly the prospective marriage is not to be deemed a consideration for the promise 'unless the parties have dealt with it on that footing'" (Holmes, Common Law, p. 292; *Fire Ins. Assn.* v. *Wickham*, 141 U. S. 564, 579). 'Nothing is consideration that is not regarded as such by both parties' (*Philpot* v. *Gruninger*, 14 Wall. 570, 577; *Fire Ins. Assn.* v. *Wickham*, *supra*). But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers".

The appellants did not produce at the hearing before the Surrogate any evidence of consideration moving from the decedent, for the making of the instrument by his prospective wife, as alleged in the petition to the Surrogate's Court by allegations denied by the answer. The appellants rely solely on the language of the instrument, which absolutely fails to state any consideration, and contend that the marriage itself was valuable consideration.

This Court has held in *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625, at page 630, as follows: "A contract should be clearly proved before it invokes the protection of the Federal Constitution". Also, in *Crane* v. *Hahlo*, 258 U. S. 142, at page 145, it was held: "While, under the holdings in People *ex rel.* Crane *v.* Ormond, 221 N. Y. 283,

and Etter *v.* City of Tacoma, 228 U. S. 142, the decedent of the plaintiff in error had a vested property right to compensation after completion of the viaduct, very clearly this was not a contract right in a constitutional sense. It has long been settled by decisions of this court that the word 'contracts' in section 10 of Article I of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent' (express or implied) to its terms is of its very essence (citing cases)". Also in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, it is stated at page 667: "The contract protected by this clause (Constitution, Article I, Section 10) must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed a revocable license".

II.

The Decision of the Court of Appeals of the State of New York Was Based on Non-Federal Grounds Adequate to Support It.

The Court of Appeals has held that the testator husband having made a new will subsequent to the enactment of Section 18 of the Decedent Estate Law, his widow by virtue of that statute became entitled, upon the execution of the new will, to a right of election to reject the provision made for her in the will and to take her share of his estate "as in intestacy". Such right of election being given in the event that the testator husband has not devised or bequeathed, in trust, to his wife an amount equal to or greater than the intestate share. By the new will there was given to the wife the sum of Two thousand ($2,000.00) dollars, when the estate of the testator amounted at his death to $236,852.74. The Court of Appeals further held that the instrument in

question, considered as a contract, "did not include the right of the husband to bequeath his estate to such persons in such amounts as he chose and thus to exclude his wife from any share of his estate. That right was created by the laws of the State of New York, not by contract" • • • "The Legislature did not by such statute destroy any rights *which the decedent in this case acquired by the waiver*—even though we give to such waiver the broadest possible construction and effect".

Cases decided by this Court and believed by the appellee to sustain his contention, are:

Hammond v. *Burbank*, 299 U. S. 519;
Lynch v. *New York ex rel. Pierson*, 293 U. S. 52;
Eustis v. *Bolles*, 150 U. S. 361;
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 78;
Enterprise Irrigation District v. *Canal Co.*, 243 U. S. 157, 163;
Cross Lake Club v. *Louisiana*, 224 U. S. 632, 638.

The appellee, Chase L. Day, as executor, etc. of Helena Day McGlone, basing his motion upon the foregoing statement and the record before this Court, respectfully moves that the appeal allowed to be filed herein be dismissed, and that the appellee be awarded his costs.

Respectfully submitted,

ANDREW F. VAN THUN, JR.,
Attorney for Appellee, Chase L. Day, as Executor, etc.

WILLIAM J. CARR,
Of Counsel.